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No. 101.

In the Supreme Court of the United States.

October Term, 1913.

THE BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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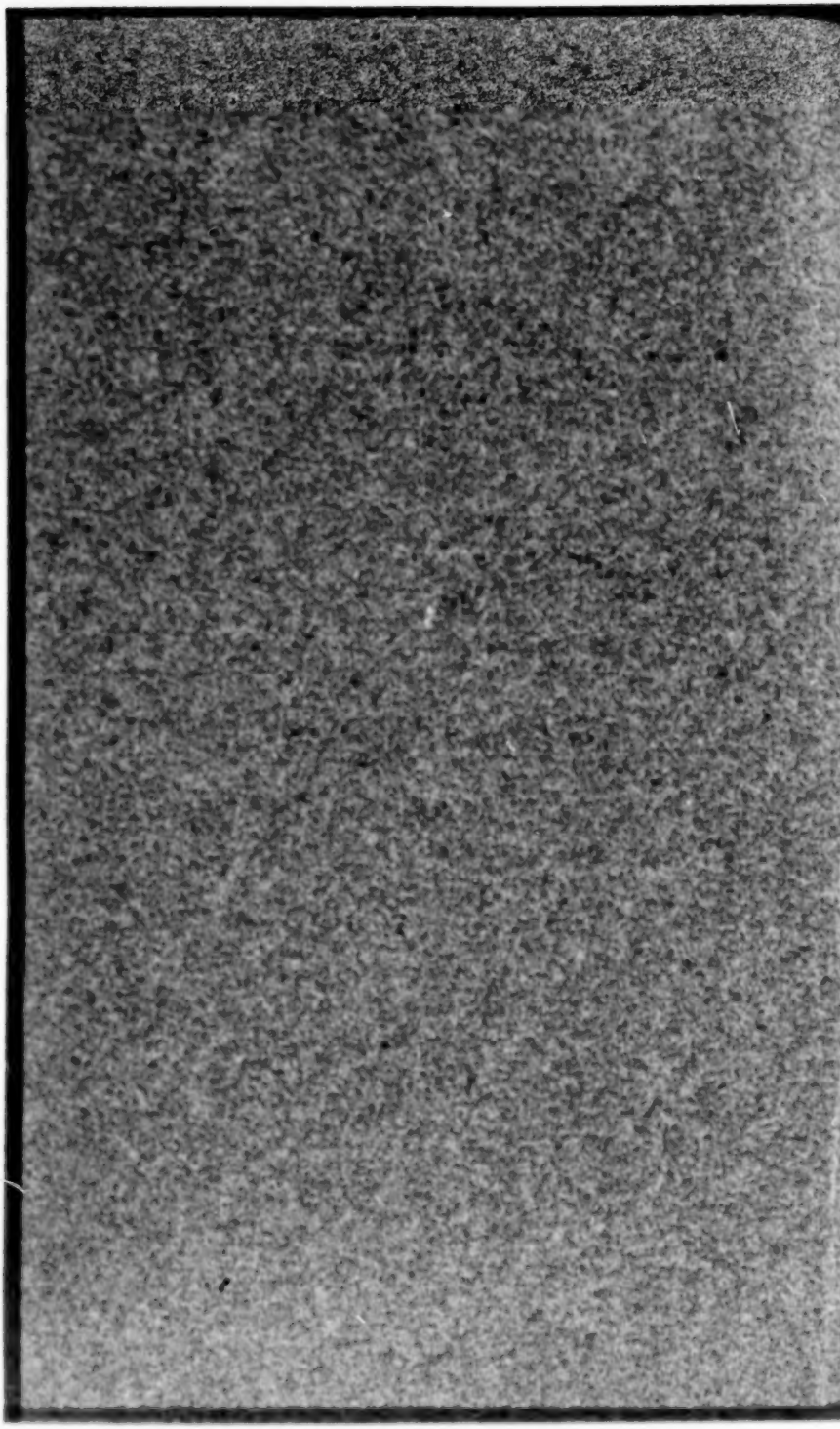

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STATEMENT OF CASE.

This is an action by the United States to recover for timber unlawfully taken from described public lands. The lands at the time of the taking were subject to an unperfected homestead entry made by one Messinger. He cut the timber, manufactured it into mining stulls and cordwood, and sold the entire product to the defendant, The Bunker Hill and Sullivan Mining and Concentrating Company, pursuant to a contract (R., 14). Very soon afterwards he relinquished his entry and abandoned his claim. There was no dispute as to the facts of the cutting, manufacture, and sale, nor as to

the values of the cordwood and different sizes of stulls sold; and there was but a slight and negligible difference concerning the quantities. The Government alleged that the land was nonmineral (subject to homestead entry), but that the cutting was wrongful and wilful. The defendant averred that the land was mineral in character, and defended upon two distinct grounds: First, that Messinger, believing the land to be agricultural, cut the timber in good faith for the purpose of clearing the land for cultivation as a homestead; second, that the land being actually mineral, the timber was lawfully taken and sold to the defendant for mining uses, under the act of June 3, 1878 (20 Stat., 88), which is as follows:

> That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of

the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

The regulations of the Secretary of the Interior adopted pursuant to this law and in force when the trespass occurred will be found in volume 29 of the Land Decisions, pages 571–572. Among them is the following:

> 8. No growing trees of any kind whatsoever less than 8 inches in diameter are permitted to be cut.

At the close of the evidence (R. 15) the court, upon the Government's motion, withdrew the "mineral land" defense from consideration by the jury—

> upon the ground that said land having been filed upon as a homestead and under such filing being in the possession and occupation of Messinger, who was claiming the right to occupy the same as a homestead during the time the timber was being cut, the same was not public land, and for the further reason that it appeared from the evidence of both parties without conflict that at least as to the fifteen acres from which all of the timber was cut, both large and small, the rules of the Secretary of the Interior prescribing what timber could be cut from mineral lands had been violated in that timber less than eight inches in diameter had been cut; and that the defendant, as a purchaser from Messinger, had no better right to make such defense than Messinger himself.

The court, however—

> instructed the jury at length with reference to the rights of a homesteader to cut and sell timber from a homestead for the purpose of clearing the same for cultivation, and the measure of damages in the event that the jury should find that the timber had been cut unlawfully, which said detailed instruction advised the jury that a homesteader had the right to cut and remove the timber and do with it what he pleased so fast as was reasonably necessary for the purpose of clearing the land and making it available for agricultural

> purposes, the court emphasizing the obligation of the homesteader while so doing to act in good faith, with due regard for his own needs and the rights of the United States so long as the latter held legal title.

The present record does not set forth the instructions given, and no error is now assigned save such as may be involved in excluding the evidence adduced to sustain the "mineral land" defense and in refusing to apply the other permissive act of March 3, 1891, mentioned below. It must be presumed therefore that in all other respects the instructions as given were accurate and complete. The jury assessed the damages at a sum slightly less than the manufactured value of the total product, as claimed by the Government, and slightly more than the manufactured value as admitted by the defendant (R., 10, 2, 8).

The jury therefore necessarily found as a fact that Messinger was guilty of a wilful abuse of his homestead privileges.

The Court of Appeals affirmed the judgment below for reasons expressed in its opinion (R., 27), as follows:

> The case shows that the land upon which the timber was cut stood upon the books of the Land Department of the Government as public land open to homestead entry and as such was entered by Messinger, who went into its possession and claimed the right to cut the timber in question to enable him to cultivate the land and to make other uses of it under

> and in pursuance of the beneficent provisions of the homestead law. One of the requirements of the oath he was compelled to take in making his entry was the declaration of his intention to occupy the land as a homestead and cultivate the same. While thus availing himself of the bounty of the Government and occupying that relation to it, he could not legally commit any act upon or in respect to the land in contravention of the provisions of the law under which he held its possession, and neither he, nor anyone claiming under him, can justify his illegal act by saying that although he could not cut the Government's timber and sell it for mining purposes under the provisions of the law under which he was permitted to go into and hold possession of the land, yet, under another law in no way at the time applicable to this particular land, persons were permitted to cut timber for mining purposes. We are of the opinion that the court below was clearly right in its ruling respecting the second defense interposed by the defendant.

In defendant's brief (pp. 15, 16) and the assignment of errors some reliance appears to be placed upon another act permitting the cutting of timber, which reads as follows:

> In the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber

> or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, *and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations*, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands. Act of March 3, 1891 (26 Stat., 1093).

The regulations adopted by the Secretary of the Interior under this act, and in force when the cutting took place, are printed in full in 29 L. D., 572–574. Regulation numbered 3 provides:

> Settlers upon public lands and other residents of the States and Territories above named may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within said States and Territories, strictly for their own use for firewood, fencing, building, or other agricultural, mining, manufac-

> turing, or domestic purposes, but not for sale or disposal, nor for use by other persons, nor for export from the State or Territory where procured. The cutting or removal of timber or lumber to an amount exceeding in stumpage value $50 in any one year will not be permitted, except upon application to the Secretary of the Interior, and after the granting of a special permit. Except as above provided, it is not necessary for actual residents to secure permission to take timber from public lands in said States and Territories for the purposes aforesaid. The exercise of such privilege is, however, subject at all times to supervision by the department with a view to such restriction as may be deemed necessary.

The answer (R., 8) alleges that the homesteader, Messinger, in addition to complying with the act of June 3, 1878, *supra*, also "complied in all respects" with this act of March 3, 1891, and "fully complied with all the rules and regulations prescribed by the Secretary of the Interior for the cutting of timber upon public mineral lands in accordance with the acts of Congress." It is quite obvious, however, that this act extends its protection only when the cutting or removal of timber is authorized by the rules and regulations formulated by the Secretary. And as regulation number 3 forbade "the cutting or removal of timber or lumber to an amount exceeding in stumpage value fifty dollars in any one year," unless under a special permit previously granted by the Secretary, it is not perceived that the argument,

or rather the suggestion, based upon this statute, calls for any special reply, since it is not, and could not be, pretended that any special permit was ever applied for or obtained. The assignment of errors filed in the Court of Appeals (R., 18) makes no mention of this statute; neither is it noticed in that court's opinion. Evidently the defendant did not think it worth while to call the statute to that court's attention.

When the case was presented to the Court of Appeals, complaint was made of an instruction in which the trial court remarked to the jury (R., 15):

> Now, cultivation, of course, may involve different conditions, different circumstances. Sometimes it might mean the planting of an orchard, sometimes the growing of alfalfa, sometimes the growing of wheat or oats, and sometimes the production of grass. I do not say to you that the production of grass is not a legitimate purpose, but where a homesteader clears a large amount of land, much larger than is necessary for plowing, and claims that he is doing that for the purpose of pasture merely, you should scrutinize what he says in that respect, and what he has done in that respect, carefully, for the purpose of seeing whether or not he is really acting in good faith, for, as you must see, it would be easy to resort to that method as a mere pretext or cover for fraud.

Upon the present review, however, defendant has abandoned its attack upon this instruction, doubtless because the instruction is so manifestly correct, par-

ticularly so under the circumstances revealed in this case.

The defendant's case (as we view it) now rests entirely upon the act of 1878, *supra*. It assumes, first, that the land cut upon was sufficiently proved to be "mineral" within the meaning of that act; second, that it was "public land" notwithstanding the existence of the homestead entry, and therefore subject to be cut over like any other mineral land owned by the Government; third, that Messinger, notwithstanding his homestead entry, the representations which he made to secure it, and his peculiar duties as a homesteader, was no less entitled to strip the land of timber, under the act of 1878, than any other person would have been; fourth, that the regulation of the Secretary of the Interior, limiting the cutting of live timber to trees 8 inches or more in diameter, is void; and lastly, that the defendant being a "*bona fide* purchaser" is exempt from any estoppel which would properly be adjudged against its vendor, even though he was found guilty of a willful trespass.

Our argument, in condensed statement, is as follows:

I. Tested by the homestead laws, the entryman's acts were those of a willful trespasser; he acquired no title to the timber cut, or to the timber products manufactured therefrom; as against him the United States was entitled to recover those products *in specie*, or to recover their value in damages.

II. The "mineral-land" statute was inapplicable (1) because the lands were not "mineral;" (2)

because they were not "public lands" when the cutting was done; (3) because the regulations were not complied with; and (4) because the entryman was estopped from claiming under that statute.

III. The defendant, whether a purchaser in good faith or not, acquired no title in the property purchased, because its vendor had no title to convey. Consequently it also was liable to surrender the property *in specie* or pay its value to the United States.

1.

Liability of the entryman as tested by the homestead laws.

1. *The cutting was a wilful trespass.*

The broad general rule is against the right to cut timber from lands of the United States. The act has long been punishable as a criminal offense (R. S., sec. 2461; Penal Code, sec. 49). In the absence of legislation expressly or by implication conferring the right, timber cutting is presumed to be unlawful; and one who claims an exception in his favor must bring himself—by clear proof—within the conditions of the authority upon which he specifically relies.

United States v. *Cook* (19 Wall., 591, 594).

Northern Pacific v. *Lewis* (162 U. S., 366, 376).

Stone v. *United States* (167 U. S., 178, 192).

Shiver v. *United States* (159 U. S., 491).

The extent to which a homesteader may lawfully fell and dispose of timber growing upon his claim is a subject which has received the consideration of this court in a number of cases and of the lower Federal courts in many more. In the *Shiver case, supra*, this court said (p. 497):

> From this résumé of the homestead act it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to divestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the act of 1831, now embraced in Rev. Stat. sec. 2461. It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it.

And in the *Stone case, supra*, this court approved as "a clear and satisfactory statement of the law" the charge of the trial court, which is set out in the report and from which we quote the following (p. 193):

> A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plough shall follow the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered by timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the preemption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it, and actually proceeding in the regular way by

> regular process of improving the land, and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation.

In the present case the testimony clearly shows, and the verdict of the jury conclusively establishes, that the entryman was guilty of a willful, inexcusable abuse of his homestead privilege. The Government alleged that the trees were taken wrongfully and willfully, and sued for the value of the manufactured products as it was when they left the hands of the trespasser and passed into the possession of the defendant. The defendant averred that the taking was innocent—done in good faith in the process of clearing the land as a homestead; and set up the ~~statutory~~ stumpage value—the value that should be assessed in case Messinger were found to be an innocent trespasser. The Government introduced evidence described in the bill of exceptions as "tending to support each and every allegation of its complaint." (R., 11.) What that evidence was does not otherwise appear. The defendant called the entryman, who testified that he entered the land as a homestead and went upon it "for the purpose of making it his home;" "that his purpose in filing a homestead upon said land was to make it a home and to clear the land for cultivation and a home," and that while the land was "mountainous and sterile and unfit for cultivation," he "thought about forty or fifty acres could be

plowed," and that "most of the balance could be used for pasture, but some of it was pretty steep for that purpose"—that "some grass grows upon it." This witness admitted the cutting; but the court upon reading his testimony (R., 12) will observe that he nowhere says that the cutting, in whole or in part, was necessary to fit the land cut over for cultivation or pasturage, or even had that tendency, or that he believed it would have that tendency, or that he did the cutting for the purpose of producing that result.

There are features of Messinger's testimony in addition to this omission which, aside from the presumed sufficiency of the Government's proof, might well be regarded as casting doubt not merely upon the good faith of the cutting but even upon the good faith of the entry itself. He conceded that the land was worthless for cultivation and without any water supply even for domestic uses; he admitted that "in cutting cordwood" he cut fifteen acres clear of all timber, large and small, and that "upon the balance he cut only that which was large enough for stulls." He failed to explain either his occasion for desiring the land for a pasture or the reason why he did not discover its worthlessness for cultivation until after the cutting was done. There was no evidence that he had any immediate need for pasture, nor was there any evidence as to how or for what purpose, or for whose stock, any pasture was to be used (R., 14). Then, also, he "left the tops and brush where they fell." And the Government

proved, in rebuttal, that, before he moved his family upon the land, he made the contract to sell the timber to the defendant (R., 14). *Anderson* v. *United States* (C. C. A., Ninth Circuit) (152 Fed., 87).

It must be assumed that, in charging the jury, the trial court defined correctly the limits within which a homesteader may lawfully cut timber, the tests of wilful and innocent trespass, and the measures of damages applicable thereto.

The verdict of the jury (R., 16) was assessed upon the basis of willful trespass, being slightly less than the manufactured value of the timber as alleged in the complaint (R., 2), slightly more than that value as conceded in the answer (R., 6-8), and quite out of proportion to the stumpage value of the timber as alleged (R., 7) and proved (R., 14).

Therefore, Messinger, in cutting the timber was guilty of a willful trespass. The verdict of the jury establishes this fact; and, furthermore (if this be material), the evidence could be viewed in no other way; for in his testimony, which affords the only reply to the Government's evidence on this subject, nothing was said which tends to show that the cutting was either calculated or intended to subserve legitimate homestead purposes.

2. *No title passed to the trespasser before or after manufacture—the stulls and cordwood remained "the absolute property of the United States."*

United States v. *Cook* (19 Wall., 591, 593).

Woodenware Co. v. *United States* (106 U. S., 432, 435).

Shiver v. *United States* (159 U. S., 491, 498).

Northern Pacific v. *Lewis* (162 U. S., 366, 374).

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Peyton v. *Desmond* (C. C. A., Eighth Circuit) (129 Fed., 1, 6).

Nitz v. *Bolton* (71 Mich., 388).

Hanselman v. *Kegel* (60 Mich., 550).

II.

Inapplicability of the "mineral-land" statute of June 3, 1878.

1. *The lands were not proved to be "mineral lands."*

Under this statute the lands must be "mineral, and not subject to entry under existing laws of the United States except for mineral entry." In the *Plowman case*, 216 U. S., 372, this court recently had occasion to interpret these words, and it held that lands to be included must be shown to be valuable for mineral deposits; that minerals must be shown to be present in sufficient quantity to justify expenditure for their extraction and to add to the richness of the lands; that the lands must be worth more for mining than for agriculture; and that the timber-cutting privilege does not apply to lands merely shown to be near or adjacent to other lands that pass these tests.

Now, whether the defendant produced evidence of the mineral value of the lands here in question sufficient as a matter of law to justify a finding by the jury that they were mineral lands in the sense of

this statute, may seriously be doubted. One witness, Sinclair (R., 12), spoke of mineral discoveries and locations on lands in the vicinity; of the productiveness of the "mining district;" of a mining claim "at one time" located on the lands in question, and of the existence upon them recently of "extensive mining works * * * which must have cost about $10,000." He also said that there were "well-defined veins upon the property carrying silver and copper." Another witness, McKinnon (R., 13) testified that he "had gone upon the premises in controversy and worked on certain mining claims owned by his brother and other individuals * * *; that he had remained there since the year 1907, working continuously," and that about "950 feet of mining work consisting of tunnels and shafts had been run, and they showed well-defined veins of mineral-bearing rock." Five other witnesses (R., 13) spoke of producing mines more or less distant. They said that the land in question contained well-defined veins carrying copper and silver, and that about $10,000 of development work had been done on that land and nearly all of it had been covered by mining locations. The exhibits (R., 14) illustrated this testimony, consisting in part of notices of locations, of which one was made in 1896, and apparently abandoned, and the five others were made in 1906 and 1907, their subsequent history not being given.

According to the bill of exceptions all of these witnesses testified that the land from which the timber

was cut "was mineral land." If we leave out this general statement, it seems quite plain that their testimony did not suffice to establish with the requisite certainty that the tract as a whole was valuable, and known to be valuable, for its minerals rather than for other purposes. In fact, while they spoke of abandoned and existing locations, and of extensive and costly mining works (in one place, presumably), and of veins containing deposits of certain minerals, these witnesses were remarkably cautious on the prime subject of mineral value—they said nothing on that subject at all. Neither did they show what parts, or what proportions, of the tract were mineralized. The testimony, taken with such inferences as may legitimately be drawn from the existing locations and mining operations, may tend to show that some portions of the tracts were chiefly valuable for mineral; but not the tracts as a whole. This would have afforded the jury no means of ascertaining what portion of the timber was taken from the mineral areas and what portion was not. The testimony also failed to show when it was that the mineral values became known. It does not show that they were known when the cutting took place.

The making of a mining location is not in itself evidence of the mineral value of the land located (*Elda M. & M. Co.* 29 L. D., 279, 281; *Magruder* v. *Oregon and California R. Co.* 28 L. D., 174). It is an *ex parte* proceeding—the act of an individual who may or may not be skilled in mining and who may or may not be actuated by good faith. An *abandoned*

location, if it signifies anything, tends to prove that valuable minerals were *not* found. Whether a discovery in one place is evidence of mineral values at another depends upon extrinsic geological facts and inferences therefrom. No inference can be drawn from the discovery alone.

It was incumbent upon the defendant to show by clear proof that the land from which the timber was derived was in fact mineral land; and if part of it was mineral and part was not, to show, by clear proof, the quantity and the value of the timber and timber products derived from the mineralized portion. As this court said in the case of *Northern Pacific* v. *Lewis* (162 U. S.), at page 376:

> The right to cut is exceptional and quite narrow, and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal. (*United States* v. *Cook*, 19 Wall. 591.)

It is submitted that the general statements of defendant's witnesses that the land was mineral can not be taken as a compliance with this requirement. Properly speaking, they amount to no more than conclusions drawn by the witnesses from the specific matters to which they testified. Such conclusions can not, of course, rise higher than the source from which they were drawn. They are opinions expressed

upon the very matter in issue—ultimate deductions which only the court was competent to make. With the issue as it was, a statement upon the part of a witness that the land was "mineral land" amounted to a conclusion of law, or meant nothing.

But we will assume that the lands cut upon were mineral within the intent of the act of 1878, and will thereupon consider whether the position of the homesteader would be in any degree improved by that assumption.

2. *The lands were not "public lands."*

The trial court appears to have based its ruling largely upon the proposition that during the existence of the homestead entry the lands could not be considered "public lands" in the sense of the act of 1878. We think this was indubitably correct. We agree that the term "public lands" is not to be dubbed with a hard and fast meaning without regard to the connection in which it is used by Congress. Broadly speaking, all property of the United States is public property, and all land which it owns is public land. If we were dealing with a statute whose object was to protect the Government against injury from fraud, spoliation, negligence, or trespass—for instance, a statute forbidding the cutting of timber, or a statute designed generally to prevent the setting out or negligent leaving of dangerous fires—we should concede without hesitation that the application of the term "public lands," used in such a connection, ought not to be allowed to depend upon any question of the status of the lands under the

general land laws, provided the lands involved were lands still owned by the Government. (*Shiver* v. *United States*, 159 U. S., 491.)

On the other hand, it has been ruled repeatedly that the words "public lands," when employed in the land laws, is to be confined in application to those lands which are open to acquisition under the general land laws, and may not be applied to such as have been reserved by the Government or to such as have been subjected to the filings and claims of individuals and are thereby segregated from the public domain.

Hodges v. *Colcord* (193 U. S., 192).

Hastings, &c., R. Co. v. *Whitney* (132 U. S., 357).

Bardon v. *Northern Pacific* (145 U. S., 535, 538).

Whitney v. *Taylor* (158 U.S., 85, 88, et seq.).

James v. *Germania Iron Co.* (C. C. A., 8th Cir.) (107 Fed., 597, 603).

For when Congress makes a grant, or provides general means for the acquisition, of "public lands," it is not to be taken as intending to undo what has already been done, or interfere with rights which have already arisen, under its previous sanction. Therefore the making of a homestead entry removes the land from the category of "public land" in this latter conception of that term. As long as the entry remains intact, the land is to be deemed appropriated by the Government to the use and benefit of the homesteader, subject, of course, to the con-

ditions and restrictions of the homestead law. If for any reason, the homesteader is not entitled to maintain his entry, that is a matter resting entirely between him and the United States, and the law has provided a way, and only one way, for determining the validity of his entry, namely, through the Land Department.

To be sure, there are provisions which allow an outsider to contest the entry, and in some, if not all, cases, to gain a preference right to make entry himself if the contest prove successful. But only one tribunal may entertain or decide the contest, i. e., the Land Department; and not until that tribunal has found the entry invalid and canceled it, or the entryman has relinquished it voluntarily, does the land become again "public land," and subject to be acquired by others under the general laws. We do not understand that these rules are diminished by any exceptions whatever.

Thus, in *United States* v. *Bagnell Timber Company* (C. C. A., 8th Cir.) (178 Fed. 795), it was held that A could not acquire any right or status as a homesteader by settling upon lands which had been filed upon under the homestead law by B, even though B had abandoned the entry; and, consequently, that timber-cutting by A could not be justified as done for homestead purposes, the court saying (p. 799):

> Martin could take no legal steps to acquire this land under the homestead or any other statutes until the entry of Davis was out of the way. There can not be two dispositions cov-

> ering concurrent time by the Government of the same tract of land. While one grant legally or equitably is outstanding, a second grant can not be made.

And in *Hodges* v. *Colcord*, *supra*, it was held by this court that a homestead entry, *prima facie* valid, though made by one in fact disqualified, removed the land temporarily out of the public domain, so that an attempt made before it was canceled to effect a second homestead entry was futile.

In the case of *Peyton* v. *Desmond* (129 Fed., 1), decided by the Circuit Court of Appeals for the Eighth Circuit, Mr. Justice Van Devanter, who delivered the opinion, had occasion to consider most fully the rights and status of a homesteader, particularly his right to recover for timber taken from his homstead by strangers prior to the making of his final homestead entry. We quote the following from page 12 of the report:

> This conditional or inchoate right included an exclusive right to the possession so long as the plaintiff should comply in good faith with the requirements of the law controlling homestead claims, and included a further right to earn and receive the title. This right to the possession and to earn and receive the title extended to everything which was part of the land—timber as well as soil. The severance of the timber from the soil was a violation or infraction of the plaintiff's right to the possession, and of his right to earn and receive the title. It was an injury to both. It may

be that the conditional or inchoate right of a homestead claimant is subject to a power in Congress to terminate it in whole or in part—as to the land or only as to the timber—at any time before it is perfected into a vested equitable estate by full compliance with the requirements of the law, but it is not terminable or subject to impairment by third persons. Unquestionably, in the absence of the exercise of such a power by Congress—and its exercise here is not claimed—the plaintiff was entitled, upon perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated.

* * * The terms of the statute are such that the presence of valuable timber on public land does not exclude it from homestead settlement or entry. It is therefore probable and reasonable that the plaintiff, in selecting this tract from among others, was influenced by the value given to it by its timber. It was the intention of the Government, by the homestead law, and was the intention of the plaintiff, in accepting the provisions of that law, that, upon his compliance with its requirements, he should be entitled to the land, with whatever advantages were incident to its natural condition and character, whether due to the fertility of its soil, or to its growth of timber. But for the act of the defendants, that intention would have been effectuated, and the timber would have passed to the plaintiff by the patent, as did the soil from which the timber was severed. It does not comport with the spirit of the homestead law to say

> that, after the initiation and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the Government may convey to him that which is left of the land, and may recover from the wrong doer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable. The principles underlying and supporting the doctrine of relation are such that it may be as readily invoked to remedy or correct a loss such as is here disclosed, occurring while the claim was being perfected, as to prevent the loss of the entire right or title through an intervening claim. The plaintiff's title under the patent relates back to a time prior to the severance and conversion of the timber by the defendants, which was after the initiation of his claim, and entitles him to maintain this action.

If the land be, in fact, mineral, the entry is liable to be canceled by the Land Department. But it is not for strangers to determine the question for themselves—or to force the homesteader to foist it upon the courts in an effort to protect his claim against their invasions. The question is not a question for the courts at all, and they have no jurisdiction to decide it.

The defendant argues, in effect, that, by force of the act of June 3, 1878, homesteads are subject to be ranged over and explored for minerals by strangers, and that the timber growing upon any mineral lands that there may be found is subject to be cut down and carried away by them without the consent and against the will of the homestead entryman. A necessary corollary of this doctrine is that the mineral lands would be subject also to be located, entered, and patented under the general mining law without the permission of the homesteader or the prior relinquishment or cancellation of his entry. This is so because when lands are both "public" and "mineral," in other words, when they are lands of the character specified in this act, they necessarily must be subject to exploration and purchase under the general mining law. There can be no sort of question but that the lands which are public and mineral for the one purpose are public and mineral for the other. We hardly need to suggest that it is only the public lands in the more limited sense of the term that are subject to the general mining law. In his work on "Mines," vol. 1, sec. 322, Mr. Lindley says:

> In the preceding chapters of this work it has been demonstrated that only the public mineral lands of the United States may be appropriated under the mining laws. By "public lands" is meant such as are subject to sale or disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of "public lands."

See also—

McFadden v. *Mountain View M. & M. Co.* (C. C. A., 9th Cir.) (97 Fed. 670, 680); *Elda Mining and Milling Co.* (29 L. D. 279).

In the case of *Elda Mining and Milling Company* (29 L. D. 279) it was held that a mineral application could not be allowed for land within a prior, subsisting, unperfected homestead entry, even though the mineral discovery and location upon which the application was based were prior in time to the entry of the homestead. The Secretary said (p. 280):

> It is apparent that the mineral entry, to the extent that it conflicts with the existing prior homestead entry of Mrs. Johnson, was erroneously allowed by the local officers. The application for mineral patent should either have been rejected to the extent of such conflict, or notice should have been given to the homestead entrywoman for the purpose of affording her an opportunity to be heard. Her entry, existing of record at the date of the application for mineral patent, was notice to the world of a prior record appropriation and segregation of the land in controversy, and no further entry thereof could be lawfully allowed while her entry still existed of record.
>
> Even if it be true, as now alleged, that the conflicting mining claim was located prior to the homestead entry, it is nevertheless equally true that the homestead entry was regularly allowed, in the absence of any claim of record in the local office at the time, as to any portion of the tract so entered. With the application

to make homestead entry was filed the usual nonmineral affidavit, declaring that the land contained no mineral, and that no portion thereof was claimed for mining purposes, thus establishing *prima facie* the nonmineral character of the land covered by the homestead entry.

* * * * *

It is manifest from the state of the record that a hearing should be had for the purpose of determining the character of the ground claimed by the mineral applicant in conflict with the prior existing homestead entry of Mrs. Johnson—that is, whether the same is more valuable for agricultural or mineral purposes—and you will accordingly direct that such hearing be had, with notice to all parties.

The burden of proof at such hearing will rest upon the mineral applicant, who is in the position of one contesting a prior entry of record apparently regularly allowed.

The Acting Secretary's opinion in the case of *The Manners Construction Company* v. *Rees* (31 L. D. 408), from which a quotation appears on page 18 of the defendant's brief, would seem to countenance the proposition that a valid location may be made of land within a subsisting homestead entry. If this were true, it would seem necessarily to follow, as stated in the quotation, that the location might lawfully be pursued to final entry and purchase, for, as is well said by Judge Ross in *McFadden* v. *Mountain View M. & M. Co., supra:*

> While it is true that the right to mineral lands is initiated by location, after the proper

> discovery of mineral thereon, and that such claims may be held and worked without purchase, yet the law authorizing their exploration also provides for their location, entry, and purchase. (Rev. St., secs. 2319–2350.) It necessarily follows that any of the lands of the United States that are by its general laws open to exploration for minerals are likewise open to location, entry, and purchase as such, if they be mineral in character, and mineral be discovered therein (p. 680).

But we have not been able to find any authority in support of this proposition in the *Manners Company case*, and an examination of the opinion will show that the language quoted by counsel was entirely uncalled for. The case involved an issue between an applicant under the Timber and Stone law and a protesting claimant of a stone placer claim. The placer was actually located before the timber and stone application was made. The placer claimant and its grantors had actual, continuing possession, had opened up and developed valuable quarries of building stone at much expense, and were actually operating the quarries and marketing the stone derived therefrom.

The department properly held, that by the express provisions of the Timber and Stone Act—

> Lands as to which any *bona fide* adverse claim is asserted under any law of the United States, or upon which there is situated any mining claim, or which contain any mining or other improvements, except for ditch or canal purposes, save such as were made by or belong

to the applicant, are not subject to sale or purchase under the statute.

The land had been filed on as a homestead some seven years before the placer location was made, but the homestead was canceled about one year after the time of location and about three weeks before the timber and stone application was filed. Obviously, under the circumstances, the timber and stone applicant was not entitled to purchase over the head of the placer claimant who had made valuable improvements and remained in possession under a *bona fide* claim.

As we have seen, the land included in a homestead entry is separated from the public domain and set apart for the use of the homesteader. So far as strangers are concerned, his possession is as exclusive and his rights as sacred as they would be if he owned the fee—as long as the homestead entry remains intact. It strikes us that to allow outsiders to enter within the limits of his claim, cut down and carry off timber, dig up the soil in quest of minerals, and erect the structures and carry on the operations subsidiary to these purposes, would not only be inconsistent with the character of his claim but would tend also to encourage violence and give rise to litigation involving questions which the courts would not be competent to decide.

3. *The regulations of the Secretary of the Interior were violated.*

The trespasser admitted "that in cutting cordwood he had cut everything large and small, whether

less than eight inches or larger," and "that upon about fifteen acres of the tract he cut everything both large and small." (R., 13.)

This was a direct violation of regulation numbered 8, which prohibits the cutting of growing trees less than eight inches in diameter.

We submit that it is immaterial that some of the timber cut was of the required magnitude. The trespass was a continuing one, and the trespasser had no idea of complying with this regulation. If we could look upon him as claiming the license of the mineral land act, we should be obliged to say that the license was wilfully exceeded. One thus guilty may not be heard to claim credit for the timber which merely chanced to be of the prescribed diameter. By his own conduct he has put himself outside of the license entirely.

The regulation is not void. It is true that the statute in terms permits the taking of "any timber or other trees," but it also directs or authorizes the Secretary of the Interior to prescribe regulations "for the protection of the timber and of the undergrowth growing upon such lands." It is not at all unreasonable to ascribe this latter provision to an intention upon the part of Congress to save the public forests from waste and obliteration. The beneficiaries are authorized to fell timber "subject to" the regulations. It is against their acts, therefore, and not merely the acts of others, that the regulations are to protect the timber and undergrowth. The fact that the undergrowth is included

shows that Congress must have had in mind the conservation of the forests, as well as the protection of existing trees. It is manifest that the conservation of forests depends more upon wise selection of the timber to be taken than upon regulating merely the manner of taking. To clear off the young trees is a wasteful and profligate use, which often results in the annihilation of the forest itself. As this act does not in terms confine the regulation to the method of taking, it should be construed in the public interest to avoid such injurious results. The invariable rule is to construe such legislation strictly against the beneficiaries and in favor of the public.

Our view finds perfect support in the contemporaneous and continuous construction of the statute by the Land Department.

We need only refer to the earliest of the rules and regulations formulated under this law, namely, those submitted by Commissioner Williamson and approved by Secretary Schurz August 16, 1878, which will be found in Copp's Land Owner, vol. 6, pp. 21 and 22. The following quotations will serve to indicate plainly the view of the statute entertained by the department at that early day, a view which has never been departed from:

> With the view to and the intention of preserving the young timber and undergrowth upon the mineral lands of the United States, and to the end that the mountain sides may not be left denuded and barren of the timber and undergrowth necessary to prevent the pre-

> cipitation of the rainfall and melting snows in floods upon the fertile arable lands in the valleys below, thus destroying the agricultural and pasturage interests of the mineral and mountainous portions of the country, I do hereby make and cause to be promulgated by virtue of the power vested in me by the act entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories (excepting Washington Territory) to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations:
>
> * * * * *
>
> 2. It shall be unlawful for any person to cut or remove, or cause to be cut or removed, from any of the mineral lands of the United States any timber or undergrowth of any kind whatsoever less than 8 inches in diameter, and any person so offending shall be liable to be fined, in compliance with the provisions of the third section of said act, in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

4. *The entryman would have been estopped from claiming that the lands were mineral lands.*

The court below was right in deciding that the defendant's vendor was in no position to set up a defense based on the act of 1878, even assuming the lands to be "public lands" within that act. As a homestead entryman, he had filed in the land office his affidavit averring that the lands were nonmineral in character and averring his intention to comply

with the homestead law, and on the faith of this representation and assurance his entry had been allowed, and the lands had been set apart for his peculiar use and benefit by the Government. Thus he had come to occupy toward the Government a position analogous to that of a tenant toward his landlord, and was bound by a fiduciary duty to exhibit the utmost good faith and do nothing inconsistent with the law under which he had gained these special advantages. The defendant's contention seems to be that since this man, as a citizen, was qualified to cut timber from mineral lands, and since (as its counsel assert) these particular lands were subject to be cut over by all other qualified persons nothwithstanding the homestead entry, no harm could come to the Government by permitting him to play the double rôle of homesteader and beneficiary of the mineral-land statute.

If the legality of acts were always to be tested by their immediate relation to dollars and cents, this argument might be sound. The same sort of reasoning would uphold a trustee in the doing of many things to his own advantage, which equity will not permit, not because they work actual damage to his beneficiary, but because they do not suit the general conception of fiduciary devotion which equity regards as necessary to guard the trust relation from possible abuse and to maintain its general effectiveness.

A homestead entryman is obliged to make oath that the land is nonmineral, as a condition to the accept-

ance of his application. (R. S., secs. 2302, 2318; Gen. Circular, July 11, 1899, p. 87; 31 L. D., p. 134; *Leonard* v. *Lennox* C. C. A., 8th Cir., 181 Fed. 760, 767.) It is his duty to exclude any land known to be mineral, and it can be no less his duty to do this in respect of lands discovered to be mineral while the entry is pending than in respect of those which were known to be such before the application was made. If he remain quiescent, notwithstanding his knowledge that lands are embraced which lawfully may not be embraced in his claim, his position is that of one who in spirit and intent, if not in positive act, is guilty of a wilful violation of the law. He should relinquish the interdicted land; maintenance of the entry as it is amounts to a continuing claim of that which he has no right to claim. As long as he continues to occupy this status of homesteader he can not claim rights in the land as mineral land without proclaiming his own fraud and wrong. This he is estopped to do. (*Ingraham* v. *United States*, 155 U. S. 434.) *Nemo allegans suam turpitudinem est audiendus.* The estoppel does not depend, like the ordinary estoppel *in pais*, upon possibility of pecuniary harm or property loss. It rests upon a variety of considerations which may not perhaps be reduced to a precise legal formula, but which are none the less patent on that account.

The Government is always injured when its laws are disobeyed. It is much interested in having the boundaries of the various land laws strictly observed; and to this end it must necessarily rely, to a very large extent, upon the representations and acts of

those persons who seek the benefits which the laws confer. (*Leonard* v. *Lennox*, *supra*, p. 766.) When such a person, by representations of fact, backed by his oath, secures for himself the formal separation upon the records of the Government of a body of the public land as agricultural land set apart for his private acquisition, under a law which forbids the acquisition of mineral land, it would be utterly inconsistent to permit him to set up rights in the same land as mineral land under another law which, in effect, excludes every claim of agricultural land. To permit such a proceeding would be to countenance the joint application of two mutually repugnant laws. It would break down and confuse the barriers of the statutes, extenuating the breach of the one by resort to the other. It would serve to encourage fraudulent misrepresentation and concealment. More specifically, it would enable the homestead entryman to gain a virtual monopoly of the timber on mineral land, which should be open to all, and foster the reprehensible and criminal practice of making "dummy" entries in behalf of extensive timber users.

III.

The defendant acquired no right or title by the attempted purchase from the trespasser.

It is enough here to refer to the authorities cited in support of subdivision 2 of proposition I, *supra*. *Nemo dat quod non habet*. As a guilty trespasser, the vendor acquired no title, either in the trees when

felled, or in the stulls and cordwood when manufactured. Therefore he could pass none by the attempted sale. The question of the defendant's good or bad faith is entirely irrelevant.

> To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the Government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.
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> *Woodenware Company* v. *United States* (106 U. S. 432, 436).

For the foregoing reasons it is respectfully submitted that the judgment should be affirmed.

ERNEST KNAEBEL,
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DECEMBER, 1912.

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